

03-3997

**United States Court of Appeals for the Eighth Circuit
Dkt No. 03-3997**

**Yang, Tu Kai,
Wu, Xue Lin,**
Petitioners,

v.

**United States Department of
Justice, Attorney General
Ashcroft,**
Respondent,

Petitioners' Brief

**PETITION FOR REVIEW OF A DECISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS**

May 19, 2004

Bruno Joseph Bembi

Attorney for Petitioner
62 Nichols Court, Suite 202
Hempstead, NY 11550
(516) 483-7372

**SUMMARY OF THE CASE &
STATEMENT REGARDING ORAL ARGUMENT**

This brief is respectfully submitted on submission. Oral argument is not desired. The issues raised in this petition are neither novel nor complex. This case requests review of the denial of a Chinese asylum application for Petitioners, husband and wife, who have two U.S. citizen children. They fear returning to China because of China's coercive family planning policy. Although the Immigration Judge [IJ] found their testimony to be credible, she denied their application largely because of the State Department reports, while at the same time failing to consider the information in numerous other articles. It was unfair for the IJ to rely extensively on the State Department reports since those reports do not specifically address Petitioners, and both Petitioners gave detailed and specific testimony as to why they fear being subject to the coercive family planning policy in China. The IJ gave no weight to testimony and evidence in the record that was contrary to her decision, and the Board affirmed her decision. These decisions thus represent an erroneous application of the substantial evidence standard and the preponderance of the evidence standard. The IJ, and the Board, utilized an inappropriately high evidentiary standard in denying Petitioners' claims. Review is de novo.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Tu Kai Yang and his wife, Xue Lin Wu, are natural persons. They are not a corporate entity. They have no parent corporations. No publicly held company holds any stock in Mr. Yang and Mrs. Wu as a corporate entity.

TABLE OF CONTENTS

I.	Subject Matter and Appellate Jurisdiction.....	1
II.	Statement of Issues Presented for Review.....	3
III.	Statement of the Case.....	4
IV.	Statement of the Facts.....	5
V.	Summary of the Argument.....	5
VI.	Argument.....	7
	A. The Law of Asylum and Withholding of Removal.....	7
	1. Asylum.....	7
	2. Withholding of removal	9
	3. Convention Against Torture Claims.....	10
	B. Standard of review.....	11
	1. Findings of fact.....	11
	2. Questions of law.....	13
	3. Exceptions to the Exhaustion Doctrine.....	15
	C. Both the BIA and the IJ misapplied the substantial evidence standard, subject to <u>de novo</u> review, by failing to consider evidence in the record contrary to their determination, and they both misapplied numerous other legal principles, subject to <u>de novo</u> review.....	16
	D. The IJ and the Board misapplied the standard governing corroboration of claims by failing to consider the contents of the	

numerous articles contrary to their opinion, and in failing to consider the supporting documentation from China.....	37
E. The BIA and IJ erred in failing to recognize that detention for illegal departure from China can be a basis for asylum.....	50
F. The IJ and the Board erred as a matter of law when evaluating Ms. Wu's and Mr. Yang's claim under the Convention Against Torture and such error is reviewable de novo.....	55
G. The State Department reports are not particularly reliable documents and it was a misapplication of the substantial evidence standard for the IJ and the BIA to rely exclusively on such reports and such error is reviewable de novo.....	58
VII. Conclusion.....	60

TABLE OF AUTHORITIES

Cases:

<u>Abankwah v. INS,</u> 185 F.3d 18 (2d Cir. 1999).....	30
<u>Abdulai v. Ashcroft,</u> 239 F.3d 542 (3d Cir. 2003).....	3, 37
<u>Aguilera-Cota v. INS,</u> 914 F.2d 1375 (9th Cir. 1990).....	50
<u>Al-Harbi v. INS,</u> 242 F.3d 882 (9 th Cir. 2001).....	49
<u>Al Najjar v. Ashcroft,</u> 257 F.3d 1262 (11th Cir. 2001).....	10
<u>Alvarado-Carillo v. INS,</u> 251 F.3d 44 (2d Cir. 2001).....	11
<u>Balasubramanrim v. INS,</u> 143 F.3d 157 (3d Cir. 1998).....	12
<u>Beharry v. INS,</u> 329 F.3d 51 (2d Cir. 2003).....	15
<u>Cardoza-Fonzeca v. INS,</u> 767 F.2d 1448 (9th Cir. 1985).....	49
<u>Chang v. INS,</u> 119 F.3d 1055 (3d Cir. 1997).....	3, 9, 52
<u>Chen v. Ashcroft,</u> 359 F.3d 121 (2d Cir. 2004).....	4, 58, 59
<u>Consolidated Edison Co. v. NLRB,</u> 305 U.S. 197 (1938).....	3, 11

<u>Coriolan v. INS,</u> 559 F.2d 993 (5th Cir. 1977).....	53
<u>Diallo v. INS,</u> 232 F.3d 279 (2d Cir. 2000).....	3, 37
<u>Drax v. INS,</u> 338 F.3d 98 (2d Cir. 2003).....	15
<u>Galina v. INS,</u> 213 F.3d 955 (7th Cir. 2000).....	58
<u>Gao v. Ashcroft,</u> 299 F.3d 266 (3d Cir. 2002).....	7, 11
<u>Garrovillas v. INS,</u> 156 F.3d 1010 (9th Cir. 1997).....	32
<u>Gramatikov v. INS,</u> 128 F.3d 619 (7th Cir. 1997).....	4, 58
<u>Haitian Refugee Center v. Civiletti,</u> 503 F.Supp. 442 (S.D. Fla. 1980).....	15
<u>Haitian Refugee Center v. Smith,</u> 676 F.2d 1023 (5 th Cir. 1982).....	15
<u>He v. Ashcroft,</u> 328 F.3d 592 (9th Cir. 2003).....	8
<u>Henderson v. INS,</u> 157 F.3d 106 (2d Cir. 1998).....	2
<u>Hernandez-Montiel v. INS,</u> 225 F.3d 1084, 1093(9th Cir. 2000).....	28
<u>INS v. Aguirre-Aguirre,</u> 526 U.S. 415 (1999).....	51

<u>INS v. Cardoza-Fonseca</u> , 480 U.S. 421, 107 S. Ct. 1207 (1987).....	51
<u>INS v. Stevic</u> , 467 U.S. 407 (1984).....	9
<u>Kamalthas v. INS</u> , 251 F.3d 1279 (9th Cir. 2001).....	56-57
<u>Khouzam v. Ashcroft</u> , 2004 WL 349895, 7-8(2d Cir. 2004).....	4, 10
<u>Kotasz v. INS</u> , 31 F.3d 847 (9th Cir. 1994).....	28
<u>Ladha v. INS</u> , 215 F.3d 889 (9 th Cir. 2000).....	50
<u>Lin v. INS</u> , 238 F.3d 239 (3rd Cir. 2001).....	53, 58
<u>Molina-Estrada v. INS</u> , 293 F.3d 1089 (9th Cir. 2002).....	28
<u>Montero v. INS</u> , 124 F.3d 381 (2d Cir. 1997).....	50
<u>Nasir v. INS</u> , 122 F.3d 484 (7 th Cir. 1997).....	50
<u>NLRB v. Columbian Enameling and Stamping Co.</u> , 306 U.S. 292 (1939).....	3, 11
<u>Olsen v. Albright</u> , 990 F.Supp. 31 (D.D.C. 1997).....	59
<u>Osorio v. INS</u> , 18 F.3d 1017 (2d Cir. 1994).....	28, 50

<u>Qiu v. Ashcroft</u> , 329 F.3d 140 (2d Cir 2003).....	9, 13
<u>Ramsameachire v. Ashcroft</u> , 357 F.3d 169 (2d Cir. 2004).....	4, 56
<u>Reno v. Navas</u> , 526 U.S. 1004 (1999).....	2
<u>Rodriguez-Roman v. INS</u> , 98 F.3d 416 (9th Cir. 1996).....	53
<u>Sanchez-Trujillo v. INS</u> , 801 F.2d 1571 (9th Cir. 1986).....	28
<u>Secaida-Rosales v. INS</u> , 331 F.3d 297 (2d Cir 2003).....	2, 11, 12, 14, 15
<u>Shah v. INS</u> , 220 F.3d 1062 (9th Cir. 2000).....	32
<u>Sims v. Apfel</u> , 530 US 103, 120 S. Ct. 2080, 147 L.Ed. 2d 80 (2000).....	15
<u>Sovich v. Esperdy</u> , 319 F.2d 21 (2d Cir. 1963).....	53
<u>Universal Camera Corp. v. NLRB</u> , 340 U.S. 474 (1951).....	11
<u>Yang v. McElroy</u> , 277 F.3d 158 (2d Cir. 2002).....	53
<u>Zahedi v. INS</u> , 222 F.3d 1157 (9 th Cir. 2000).....	49
<u>Zamora v. INS</u> , 534 F.2d 1055 (2d Cir 1976).....	59
<u>Zhang v. Slattery</u> , 55 F.3d 732 (2d Cir. 1995).....	8

<u>Zhao v. Dep't of Justice</u> 265 F. 3d 83 (2d Cir. 2001).....	3, 8, 53
<u>Zheng v. Ashcroft,</u> 332 F.3d 1186 (9th Cir. 2003).....	4, 10
<u>Zubeda v. Ashcroft,</u> 333 F.3d 463, 476 (3d Cir. 2003).....	4, 56

ADMINISTRATIVE DECISIONS

<u>Matter of Chang,</u> 20 I & N Dec 38 (May 12, 1989).....	7
<u>Matter of C-Y-Z-,</u> Int. Dec. 3319 (1997).....	8
<u>Matter of Janus & Janek,</u> 12 I&N. Dec. 866 (BIA 1968).....	53
<u>Matter of Mogharrabi,</u> 19 I&N Dec. 439 (BIA 1987).....	25
<u>Matter of O-Z- & I-Z,</u> Int. Dec. 3346 (BIA 1998).....	50
<u>Matter of S-V-,</u> 22 I&N Dec. 1306.....	10
<u>Matter of X-P-T-,</u> 21 I&N Dec. 634 (BIA 1996).....	9
<u>Matter of Y-L-, A-G-, R-S-R-,</u> 23 I&N Dec. 270 (A.G. 2002).....	11

<u>Matter of Y-T-L-</u> , 23 I & N Dec. 601, 606 (BIA 2003).....	9
---	---

STATUTES

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).....	7
INA § 106(a), 8 U.S.C. § 1105a(a)(1994).....	1
INA § 208 (a) , 8 U.S.C. § 1158 (a)	1
INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).....	1, 9
INA § 242, 8 U.S.C. § 1252.....	2
INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) (2003).....	15

REGULATIONS

8 C.F.R. § 3.1(b)(9)(2002).....	2
8 C.F.R. § 3.14 (2002)	3
8 C.F.R. § 1003.1(b)(9)(2003).....	2
8 C.F.R. § 1003.14(2003).....	3
8 C.F.R. § 1208.13(b)(1)(2003).....	7
8 C.F.R. § 1208.13(b)(2)(iii)(2003).....	28
8 CFR § 1208.13(b)(3)(ii)(2003).....	34
8 C.F.R. § 1208.16(b)(1) (2003).....	9, 32

8 C.F.R. § 1208.16(c)(2) (2003).....	10
8 C.F.R. § 1208.16(c)(3)(2003).....	57
8 C.F.R. § 1208.18(a)(1)(2003).....	10

OTHER SOURCES

<u>Coercive Population Control in China: Hearings Before the Subcomm. on Int’l Operations & Human Rights of the House Comm. on Int’l Relations</u> , 104th Congress (1995) (1995 Hearings).....	8
United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, GA Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Dec. A/39/51(1984) (Convention Against Torture, or Convention).....	1

I. Subject Matter and Appellate Jurisdiction

Petitioners, Tu Kai Yang, and his wife, Xue Lin Wu (also spelled "Yu" in different parts of the record), seek judicial review of the Board of Immigration Appeals' [BIA] decision of November 20, 2003, Joint Appendix [JA] 1-4; JA 736-738, affirming the decision of an Immigration Judge [IJ] dated October 12, 2001, JA 37-51; JA 747-761, denying their application for asylum under Immigration and Nationality Act (INA) § 208(a), 8 U.S.C. § 1158(a), withholding of deportation and removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and denying their request for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Dec. A/39/51 (1984)[Convention Against Torture, or Convention].

Ms. Wu was served with an order to show cause dated June 3, 1996, JA 919-923, placing her in deportation proceedings. This Court has jurisdiction to consider her petition pursuant to former INA § 106(a), 8 U.S.C. § 1105a(a)(1994). Although repealed by § 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-612 (1996), INA § 106, as modified by certain "transitional

changes in judicial review,” continues to govern judicial review of deportation orders, like Ms. Wu's, that were issued on or after October 31, 1996. See Pub. L. No. 104-208, Div. C, Title III-A, sec. 309(c)(1)(B) & (4)(A), 110 Stat. 3009-625 to –626(1996); Henderson v. INS, 157 F.3d 106, 117 (2d Cir. 1998)(IIRIRA transitional provisions “control deportation proceedings started prior to April 1, 1997, in which the deportation order became administratively final after October 30, 1996”), cert. denied sub nom. Reno v. Navas, 526 U.S. 1004 (1999). See also Secaida-Rosales v. INS, 331 F.3d 297, n. 1 (2d Cir. 2003), citing Diallo v. INS, 232 F.3d 279, 282 n.1 (2d Cir. 2000).

This Court has jurisdiction to consider Mr. Yang's petition pursuant to INA § 242, 8 U.S.C. § 1252, because he was served with a notice to appear dated August 23, 1999, JA 733; JA 734, placing him in removal proceedings.

This petition was docketed on December 11, 2003, within the 30-day period imposed by statute. Venue is appropriate in the Eighth Circuit because the IJ in Bloomington, MN, completed proceedings. This petition arises from a final order of the BIA, disposing of all of Mr. Yang's and Ms. Wu's claims. The BIA had jurisdiction to consider their appeal under 8 C.F.R. sec. 3.1(b)(9)(2002), renum 8 C.F.R. sec. 1003.1(b)(9)(2003). The IJ

had jurisdiction to hear their claim pursuant to 8 C.F.R. sec. 3.14 (2002),
renum. 8 C.F.R. sec. 1003.14(2003).

II. Statement of Issues Presented for Review

1. Whether both the BIA and the IJ misapplied the substantial evidence standard, subject to de novo review, by failing to consider evidence in the record contrary to their determination, and whether they both misapplied numerous other legal principles, subject to de novo review.

Apposite cases: Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292 (1939).

2. Whether the IJ and the Board misapplied the standard governing corroboration of claims by failing to consider the contents of the numerous articles contrary to their opinion, and in failing to consider the supporting documentation from China. Apposite cases: Abdulai v. Ashcroft, 239 F.3d 542 (3d Cir. 2003); Diallo v. INS, 232 F.3d 279 (2d Cir. 2000).

3. Whether the BIA and IJ erred in failing to recognize that detention for illegal departure from China can be a basis for asylum. Apposite cases: Chang v. INS, 119 F.3d 1055 (3d Cir. 1997); Zhao v. Dep't of Justice, 265 F.3d 83 (2d Cir. 2001).

4. The IJ and the Board erred as a matter of law when evaluating Ms. Wu's and Mr. Yang's claim under the Convention Against Torture and such error

is reviewable de novo. Ramsameachire v. Ashcroft, 357 F.3d 169(2d Cir. 2004); Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003); Khouzam v. Ashcroft, 2004 WL 349895 (2d Cir. 2004); Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003).

5. Whether the State Department reports are not particularly reliable documents and it was a misapplication of the substantial evidence standard for the IJ and the BIA to rely exclusively on such reports and such error is reviewable de novo. Chen v. Ashcroft, 359 F.3d 121 (2d Cir. 2004); Gramatikov v. INS, 128 F.3d 619(7th Cir. 1997).

III. Statement of the Case

Petitioners, Xue Lin Wu, and her husband, Tu Kai Yang, seek review of a decision of the BIA dated November 20, 2003. JA 2-3. Ms. Wu was served with an order to show cause dated June 3, 1996, placing her in deportation proceedings. JA 919-923. Mr. Yang was served with a notice to appear dated August 23, 1999, JA 733-734, placing him in removal proceedings. The IJ consolidated their cases and they had a joint hearing on their application for asylum and related benefits on September 6, 2001. JA 106-204. On October 12, 2001, the IJ denied their applications and ordered Ms. Wu deported and Mr. Yang removed. JA 37-51; JA 747-761. They filed a joint appeal, JA 30, which was denied by the BIA. This petition followed.

IV. Statement of the Facts

Ms. Wu and Mr. Yang married in the United States. They have two children, both of whom were born in the United States. Their first child is a son. Their second child is a daughter. Both Ms. Wu and her husband fear returning to China because of its coercive family planning policy, as well as because of their illegal departures from China. Both have numerous relatives in China who were victims of China's coercive policy.

V. Summary of the Argument

Ms. Wu and her husband, Mr. Yang, qualify for asylum, withholding of exclusion, and benefits under the Convention Against Torture because they established by a preponderance of the evidence that at least one of them would be sterilized if they return to China because of their violation of China's coercive family planning policy. Their testimony established that Chinese authorities are aware they have two children, and that the Chinese authorities specifically have targeted them for sterilization if they return to China. No credible evidence in the record establishes that either Ms. Wu or her husband would be exempt from China's coercive family planning policy. The IJ found the testimony of both to be credible. She and the BIA erred by relying on generalized statements in the State Department report to contradict Ms. Wu's and Mr. Yang's credible and specific testimony. The

BIA and IJ also erred by failing to consider voluminous articles in the record contrary to their decision. They also erred by failing to consider numerous documents which Ms. Wu and her husband obtained from China in support of their claim. Both the BIA and the IJ erred in failing to recognize that imprisonment in China for illegally departing can be a basis for asylum. They also erred by failing to apply the standards governing the Convention Against Torture independently of their analysis for asylum and withholding of deportation (or removal).

By relying almost exclusively on the State Department report to deny their claims, the IJ and BIA impermissibly heightened the standard of proof which Ms. Wu and her husband needed to meet to be successful on their claim. The BIA erroneously dismissed an affidavit from Dr. John Aird as lacking probative value, which his testimony before Congress was given considerable force in the legislative history behind the 1996 amended definition of a refugee. Both the BIA and the IJ impermissibly created a presumption that the parents of U.S. born children would not face persecution in China based on the births of their two children, while parents of children born in China do not face such a presumption. Both the BIA and the IJ failed to consider that the Chinese authorities would consider both Ms. Wu and her husband as resisters against the coercive policy. Therefore, both

the BIA and the IJ failed to engage in the requisite analysis concerning resistance to such policy. For these and other reasons discussed in this brief, the Board's decision should be vacated and the matter remanded to the IJ with instructions to consider all the evidence in the record and to apply the correct legal standards.

VI. Argument

A. The Law of Asylum and Withholding of Removal

1. Asylum

In order to be eligible for asylum, an alien must demonstrate that she is a "refugee" as defined by INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A). Once an alien has established that she has suffered past persecution, she is presumed to have a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(2003). The well-founded fear standard consists of a subjective and an objective component. See Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002).

In 1996, Congress amended the definition of the term "refugee." IIRIRA, Sec 601 (a), Div. C., 110 Stat. 300-546, 3009-689 (codified at INA § 101(a)(42)(A); 8. U.S.C. §1101(a)(42)(A) (2002)) (IIRIRA)). The amendment legislatively overruled the BIA's holding in Matter of Chang, 20 I & N Dec 38 (May 12, 1989) which held that applicants subject to or

punished for their resistance to coercive population control were not assumed to have been persecuted on a protected ground. See Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995), cert. denied, 116 S.Ct. 1271 (1996). Before passing the amendment, Congress held a series of hearings on the issue of coercive population control in China. Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rights of the House Comm. on Int'l Relations, 104th Congress (1995) (1995 Hearings). As the Second Circuit Court in Zhao v. Dep't of Justice 265 F. 3d 83, 92 (2d Cir. 2001) noted, Congressman Christopher Smith (one of the main sponsors of the amendment) “spread on the pages of the Congressional Record the findings derived from those hearings . . . Smith noted that forced abortion and forced sterilization are among the 'most gruesome human rights violations.’” See also, He v. Ashcroft, 328 F.3d 592 (9th Cir. 2003).

In 1997, in Matter of C-Y-Z-, Int. Dec. 3319 (1997), the BIA ruled: “(i) that a male applicant for asylum may ‘stand in his wife’s shoes’ and apply for asylum based on her forced abortion and sterilization, (ii) that the presumption of future persecution following such imposed medical procedures cannot be rebutted absent changed conditions, and (iii) that forced sterilization or abortion threatens the ‘life or freedom’ of the victim, and thus, absent changed country conditions, entitled her -- or the spouse --

to a withholding of deportation.” Qiu v. Ashcroft, 329 F.3d 140, 148; See In re Y-T-L-, 23 I & N Dec. 601, 606 (BIA 2003) (clarifying that coerced sterilization itself does not render victim ineligible for asylum because it “should not be viewed as a discrete, one time act” and is “better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life.”). In Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996).

2. Withholding of Removal

Withholding of removal is a mandatory form of relief. An alien must show that if she is returned to his country, her “life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion.” INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). The Supreme Court has interpreted “would be threatened” to mean “more likely than not” that the alien would be persecuted. INS v. Stevic, 467 U.S. 407, 421 (1984); See Chang v. INS, 119 F.3d 1055, 1060 (3d Cir. 1997). But where past persecution has been established, the threat of future persecution is assumed. The burden then is on the BCIS/INS to prove by a preponderance of evidence that there has been a fundamental change in circumstances. See 8 C.F.R. § 1208.16(b)(1) (2003).

3. Convention Against Torture Claims

To be eligible for withholding of removal under the Convention an applicant must show that it is more likely than not that he would be tortured if removed. Credible testimony may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.16(c)(2) (2003). Torture is defined as the intentional infliction of severe pain or suffering, under certain circumstances, when it is inflicted "with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1)(2003); Al Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001). Acquiescence includes "willful blindness". Khouzam v. Ashcroft, 2004 WL 349895, 7-8(2d Cir. 2004)("To the extent that these police are acting in their purely private capacities, then the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it", and expressly disapproving Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002) to the extent that it required "official 'consent or approval'"). The Convention does not require actual knowledge nor "'willful acceptance'" by the foreign government of the acts of torture. Zheng v. Ashcroft, 332 F.3d 1186,

1196(9th Cir. 2003)(expressly disapproving Matter of S-V-, 22 I&N Dec. 1306, and Matter of Y-L, A-G, R-S-R-).

B. Standard of review

1. Findings of fact

This Court applies the substantial evidence standard in evaluating factual findings of the BIA or IJ. Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir 2003); Alvarado-Carillo v. INS, 251 F.3d 44, 49 (2d Cir. 2001). This Court reviews the decision of the IJ when the BIA “either defers or adopts the opinion of the IJ.” Gao v. Ashcroft, 299 F.3d 266, 271 (3d Cir. 2002).

The substantial evidence standard requires that the adjudicator consider the record as a whole, including evidence and explanations which run contrary to her conclusion. Universal Camera Corp. v. NLRB, 340 U.S. 474, 478 (1951)(it is not enough to find "in the record evidence which, viewed in isolation, substantiated the Board's findings."). The Supreme Court has defined substantial evidence to be “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Substantial evidence “must do more than create a suspicion of the existence of the fact to be established.” NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939). This standard also applies to

credibility determinations. The IJ's misapplication of this standard is reviewed de novo. "Deference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record." Balasubramaniam v. INS, 143 F.3d 157, 162 (3d Cir. 1998).

As explained in Secaida-Rosales:

Generally, courts have treated credibility questions in deportation proceedings as questions of fact subject to the substantial evidence standard. . . . But at least one court has noted that "credibility findings resting on analysis of testimony rather than on demeanor may deserve less than usual deference." . . . Therefore, when a credibility determination analyzing testimony is based on flawed reasoning, it will not satisfy the substantial evidence standard. . . . In contrast, using an inappropriately stringent standard when evaluating an applicant's testimony constitutes legal, not factual, error. . . . Accordingly, we have not hesitated to vacate decisions of the BIA when they are the result of the application of improper legal standards to the evaluation of the weight to be accorded an applicant's testimony.

Specifically, when a case, like this one, rises and falls purely on an IJ's credibility finding, courts have been particularly concerned that the decision-maker carefully detail the reasoning leading to the adverse

finding. . . . An IJ cannot completely insulate her decision from review simply by dismissing all of an applicant's testimony on credibility grounds. . . . As the Ninth Circuit has noted, "the fact that an IJ considers a petitioner not to be credible constitutes the beginning not the end of our inquiry."

When an IJ rejects an applicant's testimony, the IJ must provide "specific, cogent" reasons for doing so. . . . Those reasons must bear a legitimate nexus to the finding . . . and must be "valid grounds" for disregarding an applicant's testimony. . . . "Adverse credibility determinations based on speculation or conjecture, rather than on evidence in the record, are reversible."

Secaida-Rosales, 331 F.3d at 307-308[citations omitted].

2. Questions of law

De novo review is appropriate for “‘pure’ questions of law, which the courts are as well positioned as the agency to decide” and for review of the BIA’s application of its statutory construction “whether or not the BIA's construction of a statute receives Chevron deference.” Qiu v. Ashcroft, 329 F.3d 140, 149 (2d Cir. 2003). Further, courts have vacated BIA conclusions where the BIA (1) failed to apply the law correctly, or (2) has not supported its findings with record evidence. Id. Courts review *de novo* the question of

law “regarding what evidence will suffice to carry any asylum applicant’s burden of proof.” Id. at 146. When corroboration is required, the adjudicator must: (1) identify those facts for which “it is reasonable to expect corroboration” and (2) explain why the evidence that was submitted failed to satisfy the requirement. Id. at 153. The Court of Appeals will:

vacate BIA conclusions, as to the existence or likelihood of persecution, that a perfectly reasonable fact-finder could have settled upon, insofar as the BIA either had not applied the law correctly, or has not supported its findings with record evidence. BIA errors of law are not excused by the fact that a hypothetical adjudicator, applying the law correctly, might also have denied the petition for asylum, nor can factual findings supporting such a denial be assumed on the basis of record evidence not relied on by the BIA.

Qiu, 329 F.3d at 149. Review of due process claims and mixed questions of law and fact is also *de novo*. Utilizing an "inappropriately high standard of completeness" in filling out an I-589 (application for asylum) is legal error, reviewable de novo. Secaida-Rosales, 331 F.3d at 309. Applying too stringent a standard concerning corroborating material is legal error, reviewable de novo. Secaida-Roslaes, 331 F.3d at 311. Utilizing

"speculation and conjecture" is a misapplication of the substantial evidence standard which is reviewable de novo. Secaida-Rosales, 331 F.3d at 312.

3. Exceptions to the Exhaustion Doctrine

Because Ms. Wu and Mr. Yang properly appealed the IJ's decision to the BIA before appealing to this Court, statutory "exhaustion" requirements have been met. INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) (2003).

Additionally, "issue exhaustion" is not statutorily required and is inappropriate in immigration proceedings because such proceedings are "quasi-inquisitorial", informal, and investigatory - as opposed to strictly adversarial. Sims v. Apfel, 530 US 103, 120 S. Ct. 2080, 147 L.Ed. 2d 80 (2000). As in Sims, IJs have a "duty to investigate the facts and develop the arguments both for and against granting benefits." Id. at 111. 9. Issue exhaustion is not a "jurisdiction prerequisite" but one of "sound discretion." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1034 (5th Cir. 1982), aff'g Haitian Refugee Center v. Civiletti, 503 F.Supp. 442, 468 (S.D. Fla. 1980)(exhaustion unnecessary where claims were "intimately intertwined" with issues preserved below); see also Drax v. INS, 338 F.3d 98, 106 (2d Cir. 2003)(reviewing claim that was "inextricably intertwined" with claim below); see also Beharry v. INS, 329 F.3d 51, 53, n.1 (2d Cir. 2003) ("judge-made" exhaustion "may or may not be jurisdictional").

C. Both the BIA and the IJ misapplied the substantial evidence standard, subject to de novo review, by failing to consider evidence in the record contrary to their determination, and they both misapplied numerous other legal principles, subject to de novo review.

Testimony before the IJ

The transcript of Ms. Wu's earliest hearings appears twice in the record at JA 52-75 and JA 762-784.

On September 6, 2001, Mr. Yang, and his wife, Ms. Yu, had a joint hearing before an IJ on their applications for asylum, withholding, and benefits under the Convention Against Torture. JA 110, ll. 5-7. Mr. Yang was in removal proceedings, and Ms. Yu was in deportation proceedings. JA 107, ll. 4-8. The IJ acknowledged receiving birth certificates of their two U.S. citizen children, Derek and Tammy. JA 112, ll. 5-8. The IJ acknowledged that Mr. Yu had previously withdrawn a prior asylum application, and then, eventually, filed a motion to reopen. JA 115, ll. 16-25. According to the IJ, the INS did not oppose the motion. JA 116, l. 5. The motion was granted on July 29, 1999. JA 116, ll. 7-8.

Ms. Yu gave her complete name as Xue Yu Lin. JA 133, l. 4-16. She testified she was married in New York on December 1, 1995. JA 133, ll. 22-25. She testified her husband was in immigration court and, together, they have two children. JA 134, ll. 1-10. She testified she had been pregnant a total of five times, but she experienced three miscarriages. JA 134, ll. 19-22.

She testified she desires to have more children. JA 135, ll. 7-8. She testified she and her husband want at least four children. JA 135, ll. 9-10. She explained that if she were returned to China:

I will be forced to have sterilization because I already have two children. It's against family planning policy of China. In China the policy is you can only have one child. The second child you have sterilized.

JA 135, ll. 13-16. Ms. Lin indicated she believes the Chinese authorities are aware that she has two children, JA 135, ll. 17-20, because, according to Ms. Lin,

I kept calling my family and sending pictures, and besides that, last year the government asked my brother, older brother, whether I'm being was married or not. [sic]

JA 136, ll. 5-9. Ms. Lin apparently referred to some type of census conducted by the "Family planning community", which asked Ms. Lin's brother in China whether she was married. JA 136, ll. 15-22. Ms. Lin apparently referred to some type of notarization process and authentication process conducted in China which she believed alerted the Chinese authorities to some of the relevant facts about her family life here in the United States. JA 137, ll. 6-20. When presented with a document from

China which her brother had obtained, JA 138, ll. 3-15, Ms. Lin indicated that her brother had been questioned about "family planning" issues. JA 138, ll. 16-20. Ms. Lin's attorney explained that through the procedure of trying to obtain a notarial birth certificate in China, and have it authenticated, the government of China became aware of the fact that Ms. Lin was married in the United States and has two children. JA 139, ll. 15-24. Apparently, this information came to light to the Chinese government through Ms. Lin's efforts to obtain an authenticated notarial birth certificate for herself from China. JA 140, ll. 3-10.

Ms. Lin testified she often sent photographs, apparently of her family, to her father and brother in China, who "were so excited" they told other relatives, and because they live in a "very tiny village", "Everything spread around very fast." JA 141, ll. 10-16. When asked how she knows that the Chinese government "learned of your children's birth", Ms. Lin responded because "They came to our house to check the fact." JA 141, ll. 22-25. She testified her brother informed her this happened in October of the previous year during a census. JA 142, ll. 1-17. According to Ms. Lin, "Once every few years" there is a big census, and "Once a year" they conducted a smaller one. JA 142, ll. 21-22. According to Ms. Lin, her elder brother informed the officials that she "we are in the United States, and I'm married." JA 142,

ll. 23-25; JA 143, l. 1. According to Ms. Lin, "The family cadre told him if we came back to mainland China we had to follow the family planning policy." JA 143, ll. 3-4. According to Ms. Lin, her brother informed the authorities she has children and wants more. JA 143, ll. 13-18.

Ms. Lin testified that the authorities asked about her "childbirth in the United States" when an application was made for her notarial birth certificate. JA 144, ll. 7-17. She indicated her brother was informed by the authorities that "the family policy in China is that once you have a first born boy you are not allowed to have a second child." JA 144, ll. 19-21. She indicated her brother was asked "how many kids I have." JA 145, ll. 1-4. According to Ms. Lin, the authorities said if they "ever went back to China we have to have the sterilization procedure be taken." JA 145, ll. 8-9.

Ms. Lin testified her third brother was sterilized in July 1986 after he had two children. JA 145, ll. 10-22. She indicated she has a brother-in-law who underwent an unsuccessful sterilization in September 1987 and who fled to the United States following the birth of his third child. JA 146, ll. 1-15. This attempted sterilization was "Forced. Involuntary." JA 147, ll. 8-10. Ms. Yu indicated a sister-in-law underwent sterilization following the birth of her two children. JA 151, ll. 6-12. According to Ms. Yu, her youngest brother's wife was inserted with a "double ring." JA 153, ll. 1-2. She

explained, "they forced her to induce the double ring device." JA 153, ll. 7-9. The purpose of this ring "is to prevent to have more kids." JA 153, ll. 11-12. Her second pregnancy was aborted. JA 153, ll. 23-25; JA 154, ll 1-2.

Ms. Yu agreed wit her attorney that her family was "known to the government to have repeated violation of the family planning policy". She explained, "Yes, that's why they were very strict on our family." JA 155, ll. 10-13. She testified if she returns to China, "Definitely, they will forced me to have a sterilization just like happen to my second older brother and third older brother." JA 155, ll. 14-18. She additionally fears being fined and sentenced. JA 155, ll. 19-25. She fears being sentenced because she left China illegally. JA 156, ll. 1-6. According to Ms. Yu, those who leave China illegally and return are jailed and tortured. JA 156, ll. 3-6. She testified she knows this happens in China because her relatives and friends in China told her. JA 156, ll. 16-19. Ms. Yu's attorney brought to the Court's attention that the record contains a copy of the Chinese penal code which specifies sentencing for people who left China without permission. JA 156, ll. 21-21; JA 157, ll. 1-9. Ms. Yu testified she knows people who met this fate. JA 157, ll. 12-22. The term of imprisonment, according to Ms. Yu, is eight months to one year. JA 157, ll. 21-23. This happened to a female cousin of hers who returned from Japan to China. JA 158, ll, 3-14.

She was beaten when she was detained, and sometimes she was not fed. JA 158, ll. 21-24. This happened because the government officials expect to be paid off. JA 159, ll. 2-16.

Ms. Yu testified that if she returns to China, she also must reestablish her household registration. JA 160, ll. 16-18. Because of this, she expects problems as she has two children. JA 160, ll. 22-25. She believes if she applies for a new household registration, "they will force me to have sterilization." JA 161, ll. 1-2. She testified she is unwilling to abandon her two children in the United States and would take them to China if she were deported. JA 161, ll. 3-11. However, they would also be required to become part of the household registration. JA 161, ll. 12-15. Ms. Yu explained that merely because her children were born outside China would not cause Ms. Yu to be "exempted from the one child policy or the coercive birth control policy." JA 161, ll. 21-25; JA 162, ll. 19-25; JA 163, ll. 1-7. Ms. Yu expects to be sentenced in China "and before anything happen they will force me to have sterilization first." JA 163, ll. 5-7. She believes the various authorities already know about her family status and size. JA 163, ll. 10-21.

The IJ indicated that she understood the facts of Ms. Yu's prior asylum claim concerning Tiananmen Square as one involving "alleged past

persecution". JA 164, ll. 9-14. Ms. Yu explained she had problems with the Chinese government during the student movement in 1989. JA 164, ll. 22-25; JA 165, ll. 1-10. She joined a demonstration. JA 165, l. 10. She also helped with slogans and displaying them, and delivering food and water to those involved. JA 165, ll. 13-18. She did this during a period of about 3 weeks, although not everyday. JA 165, ll 19-23. Her school principal found out and warned her not to join the demonstration group. JA 166, ll. 1-8. Ms. Yu testified she was

Taken away by the police on May 25. I was detained for three days.

They ask me who was the leader of this student movement.

JA 166, ll. 13-15. She testified she was a member of the movement. JA 166, ll. 18-20. She testified that while she was detained she was interrogated for three days and sometimes beaten up, which, she added, is very common in China. JA 167, ll. 5-8. After she was released she was dismissed from school. JA 167, ll. 13-19.

On cross-examination, Ms. Yu explained that a notary in China is employed by the government. JA 169, ll. 10-12. Ms. Yu testified she knew some Chinese couples in the United States with two children who, after obtaining legal status in the United States, returned to China. JA 171, ll. 21-25. When they returned to China, she explained, nothing happened to them

"because they have legal status in the United States." JA 172, ll. 1-7. The individual she was referring to returned to China for three months. JA 172, ll. 16-19. She explained, on re-direct, that this individual just returned to China to visit his parents, and did not reestablish his household registration in China. JA 175, ll. 4-10. On re-cross, she testified she did not know if this person originally left China illegally. JA 175, ll. 21-23. The INS attorney indicated that some prominent Chinese scholars and dissidents who were lawful permanent residents and returned to China "were imprisoned by the Chinese government none the less". JA 176, l. 1-4. Ms. Yu's testimony was consistent with her amended asylum application. JA 860-867.

Following Ms. Yu's testimony, her husband testified. He indicated he has the same fears about returning to China that his wife has concerning family planning. JA 178, ll. 19-23. He explained his "second sister-in-law" suffered under the coercive family planning policy. JA 179, l. 2. The wife of his older brother was inserted with a "double ring device." JA 180, ll. 10-12. The wife of his second brother was "forced to have sterilization in December of '96." JA 181, ll. 14-15. He testified he left China without permission. JA 182, ll. 21-22. He testified he fears sterilization and jail if he returns to China. JA 183, ll. 6-9. He testified the Chinese government knows he is married and has two children because he wrote to people in

China and his sister-in-law helped him "do the legal documents" he needed. JA 183, ll. 13-18. He testified if he returns to China, he would be required to reestablish his household registration. JA 185, ll. 8-10. When he is jailed in China, he expects to be mistreated and tortured. JA 185, ll. 21-24.

Mr. Yang testified he and his wife want to have more children. JA 186, ll. 10-11. He testified that they would not be exempted from the family planning policy because their children were born outside China. JA 186, ll. 12-15.

The IJ determined that both Ms. Wu and Mr. Yang testified credibly. JA 754(bottom). The IJ determined, however, that they "failed to prove that they have a 'well-founded fear' of future persecution". JA 754(bottom). The IJ also wrote that

they both fear future persecution by the Chinese government, particularly the Family Planning Officials (hereinafter "FPO"), if returned to China. They fear they might be jailed, fined or sterilized because they have 2 children and will be considered to have violated the family planning policies while in the United States, and because they left China illegally. Those are the primary reasons they fear returning to China.

JA 754. In light of the fact that the IJ found Ms. Wu and Mr. Yang to be credible, it is inexplicable why the IJ failed to find them eligible for at least asylum, since the IJ recognized that they fear sterilization in China in the quoted passage. The IJ failed to find that their fear was unreasonable. Thus, they are eligible to receive asylum. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

In determining that Ms. Wu and Mr. Yang failed to prove that they have a well-founded fear of persecution, the IJ ignored her own factual findings, and the uncontradicted testimony of both Ms. Wu and her husband. The IJ found they have two U.S. citizen children. JA 750(middle). She recognized that their first child was a boy. JA 750(middle). She recognized that they "would like to have at least 4 children." JA 750(middle). The IJ recounted that Ms. Wu testified that "the family planning officials in her area know that she has 2 children", specifically, the "Chang Le government in Fujian province". JA 750(middle). According to the IJ's account of Ms. Wu's testimony:

They are aware of her 2 children because she kept calling her family and sending pictures. Last year the government asked her older brother if she was married or not. That is a typical question to ask by

the government. They asked her brother because she and her husband had to get notarized documents and do the census in China.

JA 750. The IJ offered no evidence in the record to show that the Chinese government authorities do not know these facts about Ms. Wu and her husband. The IJ also recited that

The government officials would know because it is a very tiny village. The knowledge of the births of her children would be known because they came to the house to check the facts.

JA 750. The IJ cited to no evidence in the record to contradict these facts.

Additionally, the IJ wrote:

They told her brother that if she and her husband came back to mainland China they would have to follow the family planning practices.

JA 750(bottom). The IJ cited to no evidence to contradict this fact. Thus, the uncontradicted evidence in the record is that the authorities in China know of Ms. Wu and her husband's family here in the United States, and that they directly threatened the two of them that they need to comply with the coercive family planning policy. The IJ wrote:

They also told him that the family planning policy is that after she has a 2nd child, a boy, she cannot have any other children. . . . They

said that if they ever went to China they would have to have the sterilization procedure.

JA 751(top). Thus, the IJ acknowledged that Ms. Wu and her husband have good reason to fear returning to China. The IJ recited that the Chinese government has an express interest in the two of them. The IJ cited no reasons to doubt that the Chinese authorities would carry out on their pronouncement that "they would have to have the sterilization procedure."

JA 751(top). Thus, the uncontradicted evidence pertaining directly to Ms. Wu and her husband demonstrates they have a clear probability or higher of being sterilized upon their return to China.

The IJ also recited the uncontradicted testimony concerning Ms. Wu's relatives and their violations of, and problems with, China's coercive family planning policy. JA 751. The IJ mentioned the forced sterilization of Ms. Wu's third brother. JA 751. She mentioned the sterilization of the wife of Ms. Wu's second oldest brother. JA 751. She mentioned that Ms. Wu's fourth oldest brother's wife was inserted with some type of IUD, had one son, but was pregnant twice (i.e., underwent an abortion). JA 751. The IJ mentioned the unsuccessful forced sterilization of one of Ms. Wu's brothers-in-law. According to the IJ's summary of Ms. Wu's testimony,

Her family was known to violate the FPP. If she were to return to China, they would force her to be sterilized. They will fine her and sentence her because she had illegal exit from China and sterilize her. She will be sent to jail and tortured.

JA 751(bottom). The IJ offered no evidence to contradict these facts. The IJ failed to consider that Ms. Wu was describing her family as a particular social group which was targeted for persecution. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093(9th Cir. 2000); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)(noting that a family is a "prototypical" example of a social group); Molina-Estrada v. INS, 293 F.3d 1089, 1095 (9th Cir. 2002). The IJ failed to consider that the regulations provide for asylum where there is a "pattern pr practice of persecution" of members of a group who are similarly situated, and to be successful on such a claim, the asylum applicant is not required to show she fears being singled out for persecution. Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994); Kotasz v. INS, 31 F.3d 847, 854 (9th Cir. 1994). 8 C.F.R. § 1208.13(b)(2)(iii)(2003).

The IJ recounted that Ms. Wu's household registry was cancelled, JA 751(bottom), and if she returns to China, she would have to reestablish her household registration. JA 752. According to the IJ's summary of Ms. Wu's testimony,

She will have problems when she re-registers her name because she has 2 kids and violated the FPP. They would force her to be sterilized. . . . Even though her children were born in the U.S. she would not be exempted from the FPP policy. Her understanding of the government's policy about foreign born children is that she will suffer. There is no exception from the 1-child policy. They will force her to be sterilized.

JA 752. The IJ failed to cite to any evidence to contradict Ms. Wu's account.

The IJ also recognized that Ms. Wu knew a Chinese couple who had two children in the United States but were not persecuted when they returned to China because they had lawful permanent resident status in the United States. JA 752(bottom). The IJ recognized that Ms. Wu explained her friend with the lawful status who returned to China "did not intend to remain permanently in China. He just went back to visit his parents. He did not try to re-establish his household registration when he went back." JA 753(top). The IJ thus cited to the key distinction that was brought out in Ms. Wu's testimony, and mentioned in her brief to the Board, that the required act of re-registering in the household registry would notify the authorities of the household size, and eventually alert the family planning officials to such information. The IJ also recognized that Ms. Wu is aware that "well-known

dissidents" who returned to China were detained regardless of their lawful status in the United States. JA 753(top).

The IJ recognized that Mr. Yang "fears the same persecution as his wife." JA 753(middle). She recognized that Mr. Yang's oldest brother and that brother's wife received asylum in the United States because they violated the family planning policies in China and the wife had an IUD of some type inserted. JA 753(middle). The IJ recognized that the wife of another brother of Mr. Yang "was forced to be sterilized in 1996". JA 753(middle). The IJ characterized Mr. Yang's testimony as "The local government officials know he has more than 1 child." JA 753(bottom). The IJ recognized that Mr. Yang's household registration was canceled in China and he fears the necessity of reregistering. JA 753(bottom). The IJ stated that Mr. Yang testified that "He and his wife want two more children. He is not aware of any exemption for having Children born outside China." JA 753(bottom).

The above recitation of Ms. Wu's and Mr. Yang's testimony by the IJ would appear to be her factual findings, since she specifically found both of them to be credible. The IJ pointed to no contradictions in their testimony, or between their testimony and their written application for asylum. Thus, the IJ failed to cite to any specific, cogent reasons to doubt the testimony of

either Ms. Wu or her husband. Their testimony alone was sufficient to carry their burden of proof. Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999).

Instead, the IJ relied exclusively on the discredited State Department reports by selectively quoting passages which were completely unrelated to the coercive family planning claim of Ms. Wu and her husband, or which were merely generalized observations which do not take the place of individualized factual determinations. JA 755-758. For example, the IJ stated one of the State Department reports indicates, "There were no new reports of disappearances." JA 755(top). However, neither Ms. Wu nor her husband were claiming fear of being "disappeared". The IJ's reliance on the State Department's observations on Chinese family planning was a misapplication of the substantial evidence standard, because the IJ failed to consider the reams of evidence, in the form of numerous articles and reports on conditions in China, which show that the coercive family planning policy is vigorously enforced in China, that sterilization is part of the program, typically utilized following the birth of a second child, and mentioning no exceptions for children born abroad. The IJ's failure to consider evidence contrary to her determinations is a misapplication of the substantial evidence standard, as well as of the preponderance of the evidence standard. It is particularly paradoxical in light of the fact that the 1995 Congressional

testimony comprising the legislative history of the 1996 amendment makes clear that the State Department reports were not particularly reliable. The IJ erred in matters of simple fundamental fairness by accepting generalized statements in the State Department report and rejecting specific testimony from Ms. Wu and her husband which was particularized about their own personal claims. Garrovillas v. INS, 156 F.3d 1010 (9th Cir. 1997); Shah v. INS, 220 F.3d 1062, 1069 (9th Cir. 2000).

The IJ also erred by failing to consider that Ms. Wu experienced past persecution in China when she was detained, interrogated, and mistreated during the student movement in 1989. JA 752(middle). According to the IJ, Ms. Wu testified "she was taken away by the police on May 25, and she was detained for 3 days. . . . During the 3 days they interrogated her and sometimes beat her up by striking her on her back and that was it." JA 752. After finding that Ms. Wu testified credibly, the IJ failed to explain why these facts did not rise to the level of past persecution sufficient to create a presumption of future persecution and thereby creating an obligation on the part of the INS to rebut such presumption through the introduction of evidence, which the Service failed to introduce. 8 C.F.R. § 1208.16(b)(1)(2003).

The IJ wrote that she "considered the country information submitted by both parties, the decisions, resident ID's, authentication of notarial birth certificates, marriage certificate, birth certificates of the children, medical documents about pregnancies and miscarriages, and the documents submitted on favorable discretionary factors." JA 754(middle). However, the IJ only cited to the State Department reports, and failed to address any information to the contrary in the other country condition reports. The IJ failed to explain, with such proof of their marriage and their two children, why Ms. Wu and Mr. Yang do not have a reasonable fear of being victimized by the coercive family planning policy in China, especially in light of their testimony which clearly established that the government officials in China are aware of their family status, and expressly threatened them with persecution should they return to China. It is difficult to understand what more could be presented to make their case.

The IJ also confused that Ms. Wu and her husband already have two children. Thus, some of the IJ's references to the State Department reports' mentioning of a loosening of the one-child policy, would still not be helpful to a couple that already has two children. Additionally, the IJ erred when she wrote that Ms. Wu and Mr. Yang's first child was a girl. The reverse is true. The first was a boy, and their second was a girl. Thus, they would not

have come within any exception to the one-child policy. The IJ erred in failing to realize that even if two children are permitted, that means that two children are permitted with the necessity of a subsequent sterilization. The IJ erred by relying on the much discredited State Department reports, which many cases have found to be less than "Holy Grail". The IJ erred in presuming that persecutors in China implement the family planning policy in some type of rational manner. The IJ erred in failing to realize that family planning officials have incentives unrelated to limiting population growth, such as meeting quotas for personal advancement, or merely for the sake of inflicting torture.

The IJ failed to consider that John Aird's affidavit addresses the claims of the State Department reports. For example, he explains that the Chinese authorities would have no incentive to be open about the coercive nature of the policy in their communications with U.S. Consular officers. See JA 757.

Additionally, the IJ erred by finding that Ms. Wu and her husband "failed to show that the threat of persecution exists countrywide." JA 759(bottom). When the persecutor is the government, the regulations provide that an asylum applicant is relieved of the obligation of showing that the threat exists countrywide. 8 CFR § 1208.13(b)(3)(ii)(2003)("In cases in

which the persecutor is government-sponsored . . . it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate."). The INS failed to meet this burden. Additionally, no reading of the State Department reports, nor any of the evidence in the record would lead to a conclusion that fleeing to another part of China is an alternative. The members of the "floating population" are illegal in China, JA 757(middle), and the State Department report itself indicates that "it would still be very difficult for a 'wanted' person to hide indefinitely in China". JA 757(middle).

The IJ also erred when she cited to the principle that "The reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure." JA 759(bottom). The IJ listed the numerous relatives of Ms. Wu and Mr. Yang who had been coercively sterilized or, at least in one case, apparently undergone a coerced abortion. JA 41(wife of Wu Xue Xian, who was pregnant twice but has only 1 son). These people were not "unharmed". Thus, the legal principle the IJ announced is not applicable to Ms. Wu and Mr. Yang.

The BIA erred when it found that the IJ "presented a detailed account of the documentary evidence concerning Chinese population control policies". JA 3(top). The IJ failed to consider the documentary evidence that was contrary to her opinion, thus running afoul of the most basic tenets of the substantial evidence standard. Thus, the BIA's decision is inconsistent with the substantial evidence standard, and such error is reviewable de novo.

The BIA indicated it agreed with the IJ that Ms. Wu and Mr. Yang have not met their standard of proof. JA 3(top). The Board recognized that they have two children. JA 3(top). The Board misapplied the standard governing burden of proof by failing to address the fact that the IJ found Ms. Wu and her husband to be credible, and no evidence in the record contradicts the specific facts of their claim. The BIA inexplicably stated that Dr. Aird's affidavit "does not rise to that level of proof". JA 3(middle). Dr. Aird's affidavit is evidence. There was no meaningful evidence to contradict his findings. Thus, his determinations constituted a preponderance of the evidence that couples with U.S. born children would still be required to comply with China's coercive family planning policies. The BIA recognized that Dr. Aird is a "demographic expert". JA 3. Thus, the BIA failed to give any satisfactory reasons for downplaying the evidentiary value of his affidavit. It was also a non sequitor for the BIA to conclude that because

Ms. Wu and Mr. Yang did not specifically know someone in their exact situation who returned to China, that their fears of returning to China were not well-founded. This is particularly the case in light of the numerous relatives of Ms. Wu and her husband who were victims of China's coercive policy. The BIA, like the IJ, erred by placing its complete faith in the discredited State Department reports, and excluding consideration of the other voluminous documentary materials in the record. In quoting from a State Department report that "At least some couples", JA 3(middle) are not sterilized upon their return to China, the BIA failed to understand that such language means that the overwhelming majority of such couples are.

The preponderance of the evidence supports Ms. Wu's and Mr. Yang's claim. Additionally, their numerous personal documents from China, and the numerous articles about China's coercive family planning policy, also tip the scale in their favor. The IJ misapplied the preponderance of the evidence standard by failing to consider all these aspects of their evidence.

D. The IJ and the Board misapplied the standard governing corroboration of claims by failing to consider the contents of the numerous articles contrary to their opinion, and in failing to consider the supporting documentation from China.

Both the Board and the IJ failed to acknowledge that Ms. Wu and her husband had sufficiently corroborated their claim. Both the BIA and the IJ failed to explain why it would be reasonable to expect further corroboration.

Thus they misapplied the applicable standards governing corroboration of claims. Diallo v. INS, 232 F.3d 279(2d Cir. 2000); Abdulai v. INS, 239 F.3d 542 (3d Cir. 2002).

Documentation

Both sides indicated there was no objection to any of the exhibits submitted into the record. JA 201, ll. 1-3.

The record contains the curriculum vitae of Dr. John S. Aird, the U.S. Census Bureau's former Senior Research Specialist on China, from 1981 to 1985, who worked for the U.S. Census Bureau studying China for 28 years. JA 206-210.

The record contains Dr. Aird's affidavit, JA 211-221, from August 6, 2001. With regard to the prospects of Chinese couples who return to China following the birth of children in the United States, Dr. Aird points out that even according to the State Department's defective reasoning, "most of the Chinese asylum applicants in the U.S. subject to forcible repatriation would not, even under these terms, escape the punishments that apply to Chinese couples who violate the [coercive family planning] policy in China." JA 214, ¶ 8. Any exceptions which the State Department may have referred to as an inducement for Chinese scholars to return, "have never been and still are not available to most Chinese asylum seekers. Being forced to return

against their will, they cannot bargain with their government for leniency in regard to children born abroad." JA 214, ¶ 9. He refers to a couple described in a Washington Post article who were refused permission to have a second child while in the United States. JA 214, ¶ 10. He refers to a 1989 Beijing meeting which indicated that not even Chinese students are allowed to enjoy special treatment for children born abroad. JA 215, ¶ 12.

According to Dr. Aird, "In 1988, family planning enforcement in China was nowhere near as strict as it has been in the 1990s". JA 214, ¶ 10. He stated that "those who depart from China illegally and are sent home against their will can hardly expect to 'enjoy special treatment.'" JA 215-215, ¶. 12.

Dr. Aird refers to a well-known case of a Chinese woman who was eight and one half months pregnant who was deported from Australia to China following assurances by the Chinese government that she would be allowed to have her baby. JA 216, ¶ 14. She was coercively aborted. JA 216, ¶ 14.

According to Dr. Aird, "The standard penalty for any couple who have a second or subsequent unauthorized child is sterilization of either husband or wife." JA 216, ¶ 15. Dr. Aird mentions that in Fujian Province, as revealed by Congressional testimony by a former family planning official, punitive sterilization was utilized to penalize even "relatively minor infractions of family planning rules". JA 218, ¶ 17. He refers to documented cases on

extreme torture utilized in enforcement of the family planning regime. JA 220, ¶ 22. He also mentions torture of those who are detained in China "whatever the reasons for arrest." JA 220, ¶ 23. According to Dr. Aird, "there is now the distinct possibility that some of the family planning violators returned to China by the INS may be sent back to their deaths." JA 220-221, ¶ 23.

In support of his statements, Dr. Aird included copies of numerous articles and also materials from the Chinese government. JA 222-291. These include: (1) a newspaper article, The Long Arm of 'One-Child' China, JA 222-223; (2) a copy of an article from the Association of Chinese Population Students in America, JA 225-226; (3) an FBIS communiqué entitled Beijing Mayor Speaks on Family Planning Policy, JA 227; (4) an article entitled Australian Daily Views Chinese Human Rights Violation, JA 228-229, regarding the pregnant Chinese woman deported to China; (5) an Australian television news program transcript regarding the same deportation, JA 230-237; (6) an article, Amnesty tags China abortion, JA 238; (7) an article, At Least Two Other Pregnant Chinese Forced to Fly Home, JA 239-240; (8) Chinese government statements on its family planning program, JA 241-245; JA 246; JA 247-250; (9) Anhui Province regulations implementing family planning, JA 251-252; (10) additional

family planning regulations, JA 253-256; (11) an announcement entitled, Guangdong to Enforce Mandatory Sterilizations, JA 257-258; (12) additional Chinese government announcements concerning its policy, JA 259-274; (13) an article describing the drowning of an infant born in violation of the family planning policy, JA 275-277, and Chinese government pronouncements on this event, JA 278-283; (14) extract from an Amnesty International publication, Torture: A growing scourge in China - -- Time for Action, JA 284-287, with a section entitled, Torture During the Implementation of the Birth Control Policy, JA 285-287. This article states

Amnesty International has long-standing concerns about human rights violations, including torture and ill-treatment, committed during the implementation of China's family planning policy [footnote omitted].

. . .

Numerous public reports from China indicate that local annual birth quotas still play a prominent part in the policy, upheld by stiff penalties as well [sic] as rewards. . . . With pressure to perform, and popular opposition to enforcement, officials continue to resort to violence, torture and ill-treatment including physically coerced abortions and sterilizations.

JA 285. This report gives an example of an official who received 20 percent of the proceeds from fines for violation of the birth control regulations. He was encouraged to collect the fines in any way he pleased, including through the use of detentions and beatings. JA 285. Other officials reportedly detained individuals who had "humiliated them by evading or resisting family planning measures" and beat them. JA 285. This report gives other accounts of brutal treatment by the birth control officials. JA 286-287. (15) an article, China to formalize one-child policy, JA 288; (16) an article, Torture is Breaking Falun Gong, JA 289-291.

The record contains a number of articles submitted by the INS attorney: (1) For One-Child Policy, China Rethinks Iron Hand, JA 318-319; (2) Peking Softens Line on the 'One Baby' Rule, JA 320-321; (3) China's One-Child Policy is Quietly Fading Away, JA 322-323, describing a loophole that permits couples to have a second child; (4) Chinese Happily Break the 'One Child' Rule, JA 324-325; (5) Is one enough?, JA 326-335; (6) China Losing 'War' on Births, JA 337-342; and (7) China begins to phase out one-child policy, JA 343-344. The record contains a report, Asylum in the UK, China Assessment, from April 2000. JA 360-369. It describes forced abortions and sterilizations in the implementation of the family planning policy. JA 365, ¶ 6.10. It recounts U.S. Congressional testimony by a

former Fujian family planning officer that her organization used "threats, coercion, and forced sterilization and abortion." JA 365, ¶ 6.11. The record also contains a 1999 State Department country report on China. JA 370-439.

The record contains a list of 10 articles submitted by Ms. Wu's and Mr. Yang's attorney as "Independent Background Information on China's Family Planning Policy". JA 484. These articles are: (1) Ex-China Official Details Baby Laws, JA 485-486, which recounts the Congressional testimony of a former Fujian family planning official who described a system of coerced abortions and sterilizations widely and thoroughly utilized as part of China's coercive family planning policy. (2) A transcript from the television news program, Nightline, JA 487-491, by the same former Fujian family planning officer, providing additional graphic details of the use of coerced abortions and sterilizations in China. This official stated, "I saw some women that were nine months pregnant put on the operating table and forced to have abortions." JA 489 (left column). Ted Koppel announced that the following day, Congress was about to hold hearings on Chinese birth control policies. One announcer stated that the birth control official revealed "a well organized system of forced sterilizations and abortions, including those at nine months." JA 489(left column). According to the

birth control official, Ms. Gao, if an infant is born alive, the doctor will kill it in front of the mother. JA 489 (left column). According to Ms. Gao, the “order comes from above.” JA 489 (left column). She described a system where paid informers provide information “on who has become pregnant in the township.” JA 489 (left column, by Brian Ross). The officials kept “a detailed file on every woman under the age of 49 and her reproductive status.” JA 489(middle two columns). Additionally, “no one in the township of 60,000 was authorized to become pregnant unless she said so.” JA 489(column 3). According to Ms. Gao:

This is the permit to have children. After people are married, they apply to have permission to have the children and if they get pregnant without permission then we have to force them to have an abortion and if they’re not willing to, if they run away or, we capture parents or something else. We force them to do it.

JA 489(column 3). The commentator also explained there were jail cells for women who refuse to be sterilized, or who become pregnant without her permission, and for relatives “who help to hide such women”. JA 489(column 3). Some are detained as long as 5 to 8 months. JA 489(column 3). Ms. Gao also explained about the women: “Every three

months they have to come in for a checkup and if they didn't come in for the second checkup, then we take them and we sterilized them." JA 489(column 3). They are kept in jail until they are sterilized. JA 489(columns 3 & 4). There was an "abortion room" for abortions performed in the first trimester. JA 489(column 4). Additionally, abortions for women in the final months of their pregnancy, up to and including nine months, are done at a hospital because of the serious nature of the procedure. JA 489(column 4).

Additional articles in the record supporting Ms. Wu and her husband are: (3) Striking Back the Controlled Birth, Civilians from Yu Yunfu Kidnaping the Vice Town Chief, and Untie the Single Birth Policy, Eating its Own Bitter Fruit, JA 492-495; (4) A World Journal article from August 30, 1997, entitled GuangDong Severely Punish "Over-Birth" Families, Go So Far as Burning Houses, JA 496-498; (5) An October 8, 1998 World Journal article entitled Huge Slogan Write, "Who has to be left penniless; who has excess births, who has to lose his family and life." The Propaganda of One Family, One Child Policy Using Cultural Revolution's Strategem, Farmers Resent, JA 499-500; (6) an article, Fujian Governor Reiterates Last Year's Rural Family Planning Priorities, JA 501-502; (7) an article, Fujian regulations on planned parenthood, JA 503; (8) an article, Fujian family planning work leading group meets, sets tasks, JA 504; (9) a World Journal

article from December 3, 1998, entitled, Disgust with coercive pregnancy test on high school female student in Jiansu Province, JA 505-506; (10) an article, Woman with Her Second Pregnancy in Hua Du Narrowly Escaped from Forced Abortion, JA 507-509. Additional articles in the record appear as follows: (11) an article, Coercive Abortion of Mainland China Trashing Human Lives Like Grass, Hui Zhou Villagers Holding Victim's Body Strike the Town Government, JA 510-511; (12) State Department report on China, JA 513-519; (13) PRC Criminal Law, JA 520-524, including Article 322, JA 524, which provides that whoever violates Chinese law by secretly leaving China can be sentenced to up to one year of imprisonment; (14) a notice entitled, People's Government of Fuqing City, Notice Regarding Firmly Crackdown of Activities of Being Smuggled Out, JA 525-526; (15) another notice entitled, Fine and Sentencing Against People Being Smuggled Since October in Fujian, JA 527-528; (16) 1998 State Department report on China, JA 541-586; (17) State Department report on China for 1997, JA 587-630; see also JA 676-719; JA 805-847, with a map indicating that the country to the north of China in 1997 was the Soviet Union, JA 630; (18) pages from a State Department report, JA 652-657; (19) an article, America at Any Cost / Chinese seeking prosperity often risk everything on immigration, JA 658-661.

Personal documents

The record contains a statement from Tian Ying Wu, an elder brother of Ms. Wu. JA 294-295. It states he was "coercively sterilized on July 1986". JA 294(top). It states he has a brother, Yi Qi Wu, whose wife was involuntarily sterilized in March 1982. JA 294(top). It states that his younger sister's husband underwent an unsuccessful, coerced sterilization procedure and then she had a third child. JA 294(middle). Her husband then left for the United States. JA 294(middle). It states he has a younger brother upon whose wife the government performed an abortion and then she was inserted with an IUD. JA 294(middle). According to this statement, the Chinese government knows that Xue Lin Wu and her husband are married and have two children "because of the authentication process of their notarial certificates." JA 294(middle). According to this statement, the authorities allowed the certificates to be issued following payment of a fine and they warned Ms. Wu's brother that "'if they return to China, they need to comply with the government policy and obey to Family Planning Policy.'" JA 294(middle). Ms. Wu's brother states that if she and her husband return to China, they will be sterilized, fined and jailed. JA 294(bottom). The record contains a copy of Tian Ying Wu's Chinese resident identification card. JA 296-297.

The record contains a copy of Ms. Wu's authenticated Chinese notarial birth certificate, dated August 30, 2000. JA 298-303. There is also a copy of Mr. Yang's authenticated notarial birth certificate. JA 304-309; see also JA 721-722. The record contains copies of Ms. Wu's and Mr. Yang's Chinese resident identification cards. JA 310-313.

The record contains a copy of a lab report indicating Ms. Wu was pregnant on July 14, 2000. JA 346.

The record contains a copy of an asylum assessment memo from August 20, 1999, JA 348-359, finding that Mr. Yang was credible. It states that Mr. Yang claimed if he and his wife returned to China, they would face fines for violating the one-child policy, and one of them will be sterilized. JA 348. He also claimed he would be jailed and tortured for illegally departing China. JA 348.

The record contains a copy of Mr. Yang's and Ms. Wu's U.S. marriage certificate, JA 441; JA 662-664; JA 868, and the birth certificates of their two children: Derek, born on November 28, 1998, JA 442; JA 665-667; JA 869, and Tammy, born on January 12, 2000. JA 443. The record contains a doctor's letter indicating that Ms. Wu experienced a miscarriage on March 15, 1999, JA 444, and also for November 4, 1999. JA 870-871. See also JA 872. The record contains photographs of Mr. Yang and Ms. Wu and their

children. JA 445; see also JA 668-673; JA 873. The record contains a copy of Ms. Wu's Chinese passport. JA 888-892.

The record contains a list of 19 letters presented to demonstrate the existence of community ties for Mr. Yang and Ms. Wu and intended as character references. JA 446. There is also a list of documentation concerning their ownership of a restaurant. JA 446. The listed materials appear in the record at JA 447-483. The record contains a copy of an income tax return for Mr. Yang and Ms. Wu. JA 674. The record contains additional documentation of individuals expressing concern over the possible deportation of Mr. Yang and Ms. Wu. JA 739-742.

The record contains a statement from Mr. Yang dated August 2, 1999, JA 643; JA 649; JA 650; JA 651, explaining that he fears returning to China because of his violation of China's coercive family planning policy, and because of his illegal exit from China.

These articles demonstrate that there is a widespread coercive family planning policy in China which utilizes coerced abortions and sterilizations. Additionally, they demonstrate that an individual with 2 children would be particularly at risk of a coerced sterilization. The IJ failed to consider this contrary evidence in her decision, and thus violated the most fundamental principles of the substantial evidence standard.

It has been recognized that “documentary evidence pertaining to the asylum applicant himself and to events in which he was involved—can independently establish facts essential to the objective element of an asylum claim.” Al-Harbi v. INS, 242 F.3d 882, 891 (9th Cir. 2001); see also Zahedi v. INS, 222 F.3d 1157, 1163 (9th Cir. 2000); Cardoza-Fonzeca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), aff’d, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed. 2d 434 (1987). See also Aguilera-Cota v. INS, 914 F.2d 1375, 1379 (9th Cir. 1990).

Both the Board and the IJ had a responsibility to make findings regarding the documentation submitted by Ms. Wu and Mr. Yang. However, neither did so. Nasir v. INS, 122 F.3d 484, 488 (7th Cir. 1997). Under the relaxed rules of evidence in removal proceedings, all of these documents were admissible. Ladha v. INS, 215 F.3d 889, 904 (9th Cir. 2000); Montero v. INS, 124 F.3d 381 (2d Cir. 1997). 8 C.F.R. § 1208.12(a)(2003)(decision-maker may rely on “other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.”). Both the Board and the IJ failed to consider that country wide human rights violations alone could be a basis for asylum. Matter of O-Z- & I-Z, Int. Dec. 3346 (BIA 1998); Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994).

E. The BIA and IJ erred in failing to recognize that detention for illegal departure from China can be a basis for asylum.

The BIA and IJ erred by failing to recognize that that individuals may become refugees sur place. Although not binding on IJs, the UNITED NATIONS HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES [hereinafter, U.N. Handbook], has been recognized as providing useful guidance. INS v. Cardoza-Fonseca, 480 U.S. 421, 107 S. Ct. 1207, 1217, & n. 22 (1987); INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999). Paragraphs 94 through 96 provide for the recognition of “refugees ‘sur place’”. Paragraph 96 explains that “A person may become a refugee ‘sur place’ as a result of his own actions” outside his home country, and calls for “a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person’s country of origin and how they are likely to be viewed by those authorities.” Additionally, Article 61 of the U.N. Handbook recognizes that where a country provides for “severe penalties” for illegal departure, refugee status may be justified if the motive for leaving the country is based on one of the five enumerated grounds for asylum—race, religion, nationality, political

opinion, or membership in a particular social group. The IJ erred by failing to consider these facts and the applicable principles from the U.N.

Handbook.

Additionally, the IJ was presented with a memorandum restating the applicable law in China. JA 520-524. The memo includes a copy of Article 322 of the Criminal Law of the PRC, which states "Whoever violates the laws and regulations controlling secret crossing of the national boundary (border), and whenever the circumstances are serious, shall be sentenced to not more than one year fixed-term imprisonment and criminal detention or control." JA 524.

The IJ restated Ms. Wu's testimony, explaining that

They will fine her and sentence her because she had illegal exit from China and sterilize her. She will be sent to jail and tortured. . . .

Also see R-6, tab 2 on the Chinese penal code. Section 322 is for the people and section 323 is for snakeheads. She knows someone who was sent back, her female cousin went back from Japan. She paid the fine and then was jailed for 3 months last year. Sometimes they beat her up and sometimes they didn't feed her food.

JA 751(bottom). The IJ failed to cite to any evidence in the record to contradict these facts that deal directly with Ms. Wu's particularized case.

The IJ also recognized that Mr. Yang testified about the same fear of returning to China following an unauthorized departure.

In Chang v. INS, 119 F.3d 1055 (3rd Cir. 1997), the Third Circuit noted that leaving China in violation of its exit laws can be a basis for asylum in an appropriate case. Chang at 1061. The Court cited to a number of cases which demonstrate that this is an accepted principle of law. See e.g., Matter of Janus & Janek, 12 I&N. Dec. 866 (BIA 1968); Rodriguez-Roman v. INS, 98 F.3d 416, 427 (9th Cir. 1996); Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963); Coriolan v. INS, 559 F.2d 993, 1000 (5th Cir. 1977) n 3. The Third Circuit later reaffirmed this principle in Lin v. INS, 238 F.3d 239, 247 (3rd Cir. 2001).

The Second Circuit has noted:

The People's Republic of China has repeatedly cracked down on those who resist forced sterilization. It treats them as political and ideological criminals, and as enemies of the state.

On that rationale, the PRC has inflicted harsh punishment on refugees who are returned, such as beatings, and being sent to forced labor camps, and being sentenced to prison. 142 Cong. Rec. 6008-09. It was on this record that Congress amended the definition of "refugee."

Zhao v. Dep't of Justice, 265 F.3d 83, 92. Additionally, “Under Article 176 of the Chinese Criminal Code, a person violating the exit laws may receive a sentence of up to one-year imprisonment.” Yang v. McElroy, 277 F.3d 158, 161, n. 2 (2d Cir. 2002).

The IJ specifically failed to consider a number of documents in the record that indicate that China routinely imprisons those who return following an unauthorized departure. An article, America-at Any Cost/Chinese seeking prosperity often risk everything on immigration, Newsday, 1998, JA 658-661, tells the story of Zhang Xiurong, a woman whose husband left China illegally to come to the United States, but was deported back to China. The article states “[t]he penalty for failure was a three-year U.S. detention, plus another brief detention and a heavy fine in China”. JA 658(left column). The article further states that Ms. Xiurong, upon her husband’s return to China, was forced to undergo compulsory sterilization because local officials were concerned the couple would have a third child. JA 658(left column). Her belly was cut open and her uterus was removed. JA 658(left column). The record contains a notice entitled, People's Government of Fuqing City, Notice Regarding Firmly Crackdown of Activities of Being Smuggled Out, JA 525-526 and another notice entitled,

Fine and Sentencing Against People Being Smuggled Since October in Fujian, JA 527-528.

The IJ cited a State Department report, indicating

Returnees are generally fined anywhere between \$600 and \$6,000.

Many are also subject to lengthy administrative detention or reeducation through labor camps.

JA 758(bottom). The BIA and IJ also failed to consider that the punishment inflicted upon Ms. Wu and her husband for leaving China illegally is also bound up with their violation of China's coercive family planning policy, which the amended definition of a refugee equates with the political opinion grounds for asylum. The Board's and the IJ's failure to apply these principles, and failure to consider the material in the record, is reviewable de novo.

F. The IJ and the Board erred as a matter of law when evaluating Ms. Wu's and Mr. Yang's claim under the Convention Against Torture and such error is reviewable de novo.

The legislative history of the 1996 amendment to the definition of a refugee clearly indicates that coerced sterilizations and abortions are to be considered torture within the ambit of the Convention Against Torture. 1995 HEARINGS at 38-41. According to the statement of John M.A. Burgess, "When you have millions of men and women being forced to be sterilized or

aborted, certainly that is a consistent pattern of gross violation of human rights affecting all of them." 1995 HEARINGS at 39. He continued, "It is equally clear that forced sterilization and abortion violate international customary legal norms enunciated in the Declaration of Human Rights and prohibited by the International Covenant on Political Rights and specifically by the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment". Id. A brief that Mr. Burgess co-authored on this issue was placed in the appendix to the hearings. 1995 HEARINGS at 110-119. One of the brief's point headings states, ". . . Coerced Sterilization and/or Abortion is a Cruel, Inhuman, or Degrading Treatment or Punishment Prohibited by the . . . 'Torture Convention'". Id. at 111.

Because the analysis for a Convention Against Torture claim is independent of the analysis for an asylum claim, an adverse credibility determination or a failure to carry one's burden of proof for asylum will not necessarily defeat a claim under the Convention. Ramsameachire v. Ashcroft, 357 F.3d 169 (2d Cir. 2004); Zubeda v. Ashcroft, 333 F.3d 463, 476 (3d Cir. 2003)("Allowing the taint of the earlier adverse credibility determination to bleed through to the BIA's consideration of her claim under the Convention Against Torture without further explanation is therefore error"). Under the applicable regulations, the adjudicator must consider "all

evidence relevant to the possibility of future torture", 8 C.F.R. § 1208.16(c)(3)(2003), and thus a claim under the Convention "is not merely a subset of claims for either asylum or withholding of removal." Kamalthas v. INS, 251 F.3d 1279, 1283 (9th Cir. 2001). 8 C.F.R. § 1208.16(c)(3)(2003) provides:

In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

. . .

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

Neither the Board nor the IJ engaged in this analysis. They thus misapplied the applicable standards in evaluating claims under the Convention. They erred as a matter of law. Such error is reviewable de novo, and warrants a remand to the IJ for a new decision.

The IJ wrote that "Even if the Respondent may be fined or subject to administrative detention for illegally leaving China, the government has the

right to enact and enforce laws to deal with the large scale smuggling of people out of China." JA 759(middle). This is an erroneous restatement of the law. No government has the right to prevent its people from fleeing persecution that the government inflicts. Also, there was no claim that either Ms. Wu or her husband were alien smugglers. The IJ overlooked that the voluminous country conditions reports indicate that torture is widespread in China's detention facilities. Thus, the IJ erred by failing to apply the standards of the Convention Against Torture.

G. The State Department reports are not particularly reliable documents and it was a misapplication of the substantial evidence standard for the IJ and the BIA to rely exclusively on such reports and such error is reviewable de novo.

As noted in Lin v. INS, 238 F.3d 239 (3d Cir. 2001), the IJ's and the BIA's decisions "cannot be simply be sustained by invoking the State Department's authority." In Galina v. INS, 213 F.3d 955, 959 (7th Cir. 2000), the Seventh Circuit explained that while the State Department's country report is evidence to be considered, the BIA "should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ."

Additionally, the analysis of "the State Department is not binding either on the service or on the courts; there is perennial concern that the Department soft-pedals human rights violation by countries that the United States wants to have good relations with." Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir.

1997) (holding that an alien can point to a “highly credible independent source of expert knowledge” to rebut and contradict the State Department’s analysis, which may be erroneous). State Department policies may have more of an influential role in its determinations than objective assessments. Olsen v. Albright, 990 F.Supp. 31 (D.D.C. 1997). See also Chen v. Ashcroft, 359 F.3d 121 (2d Cir. 2004); Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976).

Even as early as 1995, a highly credible independent expert rebutted the Report’s highly contestable analysis of coercive family policy in Fujian province. The objectivity and accuracy of the State Department Reports received wide attention in the hearings that Congress held in 1995, as it was deliberating on amending the definition of refugees to include victims of coercive population control. See 1995 Hearings. In the hearings, John Aird, U.S. Census Bureau’s principal expert on the PRC, severely criticized the State Department Report, as being “ostensibly intended to facilitate evaluation of individual cases on their merits,” but its depiction of family planning policies in China in general and Fujian in particular were “inaccurate” and “misleading” and “seem[ed] to counsel the denial of asylum.” Id. at 14. In his analysis submitted to Congress, Aird noted:

In regard to Fujian province, the [Report implies that Fujian

province] is less strict than other provinces in enforcing family planning policies . . . In 1990 Fujian's birth rate was 24.44 per thousand population, 16 percent above the national average on 21.06 per thousand, but by 1992 Fujian's birth rate had fallen to 18.18 per thousand, slightly below the national average of 18.24 for that year. [Thus the Report's] inference that Fujian is lax in enforcing family planning requirements and hence asylum claims by refugees from Fujian lack merit is also contradicted by the relevant evidence.

Id. at 90. Neither the Board nor the IJ demonstrated any awareness of this Congressional testimony.

VII. Conclusion

WHEREFORE, it is respectfully requested that the BIA's opinion be vacated, and that Ms. Wu's and Mr. Yang's case be remanded to the IJ with instructions to conduct a hearing de novo in light of all the evidence in the record, and that she apply all applicable legal standards.

Respectfully Submitted,

Date: May 18, 2004

BRUNO JOSEPH BEMBI
Attorney for Petitioner
62 Nichols Court
Suite 202
Hempstead, NY 11550
(516) 483 - 7372

CERTIFICATE OF SERVICE

I, Bruno Joseph Bembi, certify that I served two copies of this brief
by regular mail, postage prepaid, on this date to:

U.S. Department of Justice
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Dated: May 20, 2004

Bruno Joseph Bembi
Attorney for Petitioner
62 Nichols Court Suite 202
Hempstead, NY 11550
(516) 483-7372

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (c),
I certify that this brief is proportionally spaced, has a typeface of 14
points using Times New Roman typeface, and according to the
“Word” wordprocessor, contains 13,486 words.

Dated: May 20, 2004

Bruno Joseph Bembi
Attorney for Petitioner

SPECIAL APPENDIX

- 1).- Petition for Review**
- 2).- Written decision of the Immigration Judge**